

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF AND APPENDIX FOR APPELLANTS

IN THE
United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA

—
No. 7,880
—

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA
FILED NOV 5 - 1941
779

IRENE N. MEYERS, *Appellant* *Joseph W. Stewart*
v.

CAPITAL TRANSIT COMPANY, a corporation, *Appellee* *CLERK*

No. 8177
FRANK G. MEYERS, *Appellant*

v.
CAPITAL TRANSIT COMPANY, *Appellee*

—
**Appeal from the Municipal Court of the United States
for the District of Columbia**
—

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Washington, D. C.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7,880

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FRANK G. MEYERS, *Appellant*

v.

CAPITAL TRANSIT COMPANY, a corporation, *Appellee*

BRIEF ON BEHALF OF APPELLANTS.

Jurisdictional Statement.

This is an appeal by Irene N. Meyers and Frank G. Meyers, plaintiffs below, from judgments for the defendant entered by Judge Armond W. Scott, of the Municipal Court of the District of Columbia, on the verdicts of a jury in actions for damages for personal injuries for \$1,000, respectively (Appellants' App. 1~~2~~). 7

The Municipal Court had jurisdiction under Title 18, Sec. 193, 1929 D. C. Code (Act of March 3, 1921, 41 Stat. 1310, c. 125, sec. 1).

This Court has jurisdiction to review the judgments under Title 18, Sec. 29, 1929 D. C. Code (Act of March 3, 1921, 41 Stat. 1312, c. 125, sec. 12). The petition for writ of error has been granted by this Court (Transcript of Record 14).

The pleadings necessary to show the existence of jurisdiction are the declarations (Appellants' App. 1, Transcript of Record 2, 5).

Statement of the Case.

On March 6, 1938 the plaintiffs, Irene N. Meyers and Frank G. Meyers, boarded a street car of the defendant in the City of Washington, D. C. to go to Branchville, Maryland to visit their friends, Mr. and Mrs. McCarthy. They had never ridden that line before. The street car stopped at the Branchville car stop at about 12:30 p. m. and Irene N. Meyers said that she stepped off at the front of the street car with her left foot on the step of the street car and she slipped upon placing her right foot on the ground. The step appeared to be a good distance from the ground. The fall rendered her unconscious and she was picked up and later taken to the hospital (Appellants' App. 9).

She said that her ankle did not give way and she did not have an opportunity to walk away from the street car for she fell upon alighting. She did not know the condition of the ground as the fall stunned her (Appellants' App. 10).⁹ The shoes introduced in evidence were worn by her on that date and have not been worn since and are in the same condition as on the day of the accident. She identified the photograph as portraying the place where the accident occurred.

Frank G. Meyers, husband of Irene N. Meyers, said the street car was one man operated and they went up front to get off. Most of the street car blocked Branchville Road. He was getting change from the motorman conductor to pay their fares (Appellants' App. 10, 11). His back was to his wife and, upon an exclamation of a fellow passenger, he turned around and saw his wife sprawled on the ground near the street car with her head farthest away.

"The ground at the car stop was not any different from the surrounding terrain and dirt road, Branchville Road; that the front of the street car was directly over a car switch was heavily covered with oil and

grease which appeared to be axle grease and this grease extended out from its rails to the point of alighting; that the place where she alighted was rough and irregular and there was a depression at the place of alighting; that many large stones were exposed and many pebbles and stones were loose on the ground; that the ground, pebbles and stones were covered with grease; that he had removed two large stones about three inches in diameter which were laying loose on the ground about two weeks after the accident and they were similar in manner and fashion at that time as the day of the accident * * * The ties upon which the street car rails were fastened were embedded in the ground and the top of the railroad ties was even with the ground but that the rails themselves were off and above the ground."

Jane McCarthy said that she lived at Greenbelt, Maryland and was very familiar with the car stop as she had used it many times. The conditions then existing had existed for a long time and the condition of the ground at the car stop was the same as Branchville Road (Appellants' App. 11). [See photographs as to dirt road.]

The trial judge refused to permit her to testify that she had seen persons slipping and falling upon alighting at the car stop because of the prevailing conditions, and were still causing accidents; that she and other persons in the community had made complaints and representations to the street car company. Counsel for plaintiffs excepted after having made offer of proof (Appellants' App. 12, Transcript of Record 20).
11

The defendant introduced evidence that Irene N. Meyers fell after she had taken four or five steps, about eight to ten feet, "when she looked back, turned and sat down" (Appellants' App. 12, 14). The front of the street car was over the car switch.

"It was stipulated that the car was brought to a stop at the place provided by the defendant for pas-

sengers to board and alight and walk away from the street car" (Appellants' App. 15). / 4

Mr. Miles testified over the objection and exception of the plaintiffs that he was the inspector of transportation equipment for Public Utilities Commission of the District of Columbia and that the street car met with the approved specifications; that it was the best known type; that he had examined this street car on November 2, 1938; that the step was fifteen inches from the ground; "that if the car was heavily loaded the springs would give so that the step would be nearer the level surface than fifteen inches; that if the car had been used considerable and the springs weakened it would be nearer the level surface than fifteen inches. * * * Upon cross examination he testified that the jurisdiction of the Public Utilities Commission of the District of Columbia did not apply to the State of Maryland; that he had no authority or control to supervise the equipment used in Maryland; that he was not qualified to speak in respect to any regulation requirements of the Public Service Commission of Maryland regarding street car equipment; that he inspected equipment for use in the City of Washington with paved streets and raised platforms and otherwise" (Appellants' App. 14). / 3

The court refused to give certain plaintiffs' instructions and granted instructions of defendant and refused to instruct that the jury could find negligence upon all the evidence but instructed them that they could only find negligence on the evidence of the plaintiffs (Appellants' App. 14-16, 20-22, 23). Plaintiffs excepted.

The word "platform" was used by counsel for defendant in his opening statement to the jury, in questioning the defendant's witness, Al Johnson, and in arguing the case to the jury over the exception of plaintiffs (Appellants' App. 8, 12, 23). The court used the word "platform" in his

charge over the exception of plaintiffs (Appellants' App. 17, 18, 23).

19, 22

Regulation and Rules Involved.

"Public Utilities Commission, Order No. 683.

Section 10. * * *

(b) No car shall be ordered or purchased for service in the District of Columbia by a street railway company until its plans and specifications have been approved by the commission.

(c) No material change in equipment, plan, or arrangement shall be made on any street railway car until the plans and specifications for such change or alterations are submitted to and approved by the Commission."

"District Court rule 23. Pleas.

1. The plea of the general issue is abolished.

2. Shall state what.—Every pleading shall set forth the true facts upon which the pleader relies."

"Municipal Court rule 2,

Section 8

* * * Pleadings in Class A shall be similar in form to those required by the law rules of the Supreme Court of the District of Columbia * * *."

Statement of Points Relied on on Appeal.

Amended Assignments of Error.

The plaintiffs hereby assign as error committed by the trial court in the above entitled causes the following:

1. Denying the demurrers to the pleas.
2. Permitting the use of the word "platform" by counsel for the defendant in his opening statement to the jury.
3. Excluding the proffered testimony of Mr. and Mrs. McCarthy.
4. Permitting the word "platform" by counsel for the defendant in questioning Mr. Al Johnson, defendant's witness.
5. Admitting the testimony of Mr. Miles, defendant's witness.

6. Refusing to grant plaintiff's Instruction No. 1.
7. Refusing to grant plaintiff's Instruction No. 2.
8. Refusing to grant plaintiff's Instruction No. 3.
9. Refusing to grant plaintiff's Instruction No. 4.
10. Refusing to grant plaintiff's Instruction No. 5.
11. Refusing to grant plaintiff's Instruction No. 6.
12. Granting defendant's Instruction No. 3.
13. Permitting the use of the word "platform" in the argument of counsel for the defendant to the jury.
14. Refusing to instruct the jury that they must consider all the testimony as to charge of negligence.
15. Instructing the jury that they must consider only the plaintiff's statement as to the charge of negligence.
16. Refusing to charge the jury that 51% is a fair example of what is meant by a fair preponderance of the evidence or burden of proof.
17. The use of the word "platform" by the court in his charge to the jury.

Summary of the Argument.

I.

The pleas did not state the facts in accordance with the rules of court (Assignments of Error 1).

II.

The use of the word *platform* by counsel for the defendant throughout the trial and by the court in its charge was erroneous and prejudicial in that no platform actually existed (Assignments 2, 4, 13, 17).

III.

The proffered testimony of witnesses who had seen accidents at the car stop and who had reported these occurrences to the street car company should have been admitted (Assignments 3, 7, 8).

IV.

It was error to permit the witness to testify as an expert as to the approval of the type of street car, examination of the street car after the accident and as to hypothetical questions not based upon the facts (Assignments 5, 6).

V.

It was ~~not~~ error not to compare the car stop to a railway station in regard to the duty of the defendant for it was stipulated that the street car had stopped at the place provided by defendant for passengers to alight and pass over (Assignment 9).

VI.

It was error for the court to deny an instruction that the duty of the defendant was to provide for passengers a place to alight and walk away from the street car free from dangerous conditions (Assignments 10, 11).

VII.

Defendant's instruction No. 3 is incorrect in that it does not state that the defendant bears the burden of proof as to the contributory negligence of the plaintiff (Assignment 12).

VIII.

It was error for the court to refuse to instruct that all the evidence must be considered as to negligence, and then to instruct that only the testimony of the plaintiff as to the charge of negligence should be considered (Assignments 14, 15).

IX.

As the court had charged that if the evidence equally balances the jury must find for the defendant, it was error

not to state that a fair example of the preponderance of the evidence was 51 per cent (Assignment 16).

ARGUMENT.

I.

The pleas did not state the facts in accordance with the rules of court.

Assignment 1 of the Assignments of Error is Argument I (Brief 5, Appellants' App. 7).

The pleas of the defendant do not allege the facts of a real and proper defense. A regulation of the Public Utilities Commission of the District of Columbia is not a proper legal defense to an action arising in Maryland. The declarations allege negligent maintenance and operation of an unsafe means of egress from the street car in that the step was too high from the ground and that the ground was uneven, rough, broken and covered with rocks and boulders and all of that covered with axle grease. The pleas do not adequately meet these charges (Appellants' App. 5). The requirements of the common law rules of the District Court and the Municipal Court were not met (Brief 15).

II.

The use of the word platform by counsel for the defendant throughout the trial and by the court in its charge was erroneous and prejudicial in that no platform actually existed.

Assignments 2, 4, 13 and 17 are combined (Brief 5, 6).

The pleas do not aver any *platform*. Counsel for defendant in his opening statement to the jury stated that a *platform* had been provided for the passengers to alight. Counsel for plaintiffs objected on the ground that a *platform* was not alleged and the proof could not be broader

than the allegations. There was no evidence that there was any *platform*. In fact, the testimony of the witnesses, photographs and stipulation of counsel during the trial was to the contrary (Appellants' App. 11, 15). 14

Counsel for defendant in examining Al Johnson, witness for defendant, and in his summation to the jury was misleading in the prejudicial use of this word (Appellants' App. 12, 13); for *platform* has a commonly accepted meaning which does not fit the physical facts in this case.

This prejudicial error in giving the jury an incorrect description of the evidence was increased by the use of the word *platform* by the court in its charge to the jury (Appellants' App. 18, 20). The court went so far as to use the word "sidewalk" (Appellants' App. 19). There was no sidewalk nor platform but dirt surface, level with and similar in composition to the adjoining road and terrain (Appellants' App. 11, 12, 15). 10, 11, 14

The New Century Dictionary (New York, 1931) defines "platform. (French plate-forme, literally 'flat form,' plan, flat area: cf. plate.) I. n. * * * a raised level surface or area; a level place for mounting guns, as in a fort; a flat elevated piece of ground; commonly, a raised walk or structure beside a railroad-track, as at a station, for passengers or freight * * * a projecting floor or landing, at the end of a railroad-car or street-car; * * *"

This charge of negligence of means of egress involves the maintenance of a proper and safe place to alight and walk away from the street car. The connotation of the meaning of the word *platform* is a denial of such a charge. Not only that but platform gives the idea of a raised surface which negates—tendency at least—the other charge of negligence that the step was too high from the ground. It tends to deny, if it does not deny, the stones and grease on the ground where plaintiff fell.

III.

The proffered testimony of witnesses who had seen accidents at the car stop and who had reported these occurrences to the street car company should have been admitted.

Assignments 3, 7 and 8 are combined (Brief 5, 6, Appellants' App. 16). 15

Mrs. Jane McCarthy and her husband would have testified of their personal knowledge as to previous and continuing accidents that were similar to the one that had occurred to the plaintiff. Moreover, they would have testified that representations of these conditions and occurrences had been made by them and others to the defendant (Appellants' App. 11, Transcript of Record 20).

The court below refused to give Plaintiffs' Instruction No. 2 that it was the duty of the defendant to warn passengers of the prevailing conditions upon alighting from the street car at this stop if the jury believed from the evidence that the conditions were unsafe and dangerous. *Capital Traction Co. v. Wathen*, 35 App. D. C. 577.

It therefore follows that Plaintiffs' Instruction No. 3 as to other accidents and past conduct as stated in *Capital Traction Co. v. Copland*, 47 App. D. C. 152, should have been given.

IV.

It was error to permit the witness to testify as an expert as to the approval of the type of street car, examination of the street car after the accident, and as to hypothetical questions not based upon the facts.

Assignments 5 and 6 are combined (Brief 5, 6, Appellants' App. 13, 15).
14

Mr. Miles testified as the inspector of transportation equipment for the Public Utilities Commission of the District of Columbia and as to an examination of the street car in the accident on November 2, 1938 (accident on March 6, 1938). He admitted that he tested for paved city streets and raised platforms and not for country conditions and that he had nothing to do with the Public Service Commission of Maryland and not qualified to speak regarding equipment and conditions in Maryland (Appellants' App. 14). / 2 He testified that if the street car was heavily loaded and if the car had been used considerably and if the springs had been weakened, the step of the street car would be nearer the level surface than fifteen inches. There was an absolute absence of evidence as to these assumed facts. On the contrary he testified that the street car "had been purchased recently" and that it "was the best known type of street car construction."

The uncontradicted testimony of the plaintiff husband was that "the top of the railroad ties was even with the ground but that the rails themselves were off and above the ground" (Appellants' App. 11). / 0

The court below should have instructed in consonance with *Capital Traction Co. v. Copland*, see above, that height of step, condition of ground of car stop and other circumstances were facts to be considered by the jury as to negligence of defendant in providing safe and suitable place for passengers to alight and pass over; further, that approval of equipment did not constitute a negation of negligence.

V.

It was error not to compare the car stop to a railway station in regard to the duty of the defendant for it was stipulated that the street car had stopped at the place provided by defendant for passengers to alight and pass over.

Assignment 9 is Argument V (Brief 6, Appellants' App. 15 16).

It should be noted that the trial judge's charge to jury was stenographically reported and thereafter changed, with consent of counsel, by him as to grammar.

"It was stipulated that the car was brought to a stop at the place provided by the defendant for passengers to board and alight and walk away from the street cars" (Appellants' App. 15). 14

The court below should have charged that the duty of the defendant to provide a reasonably safe and suitable place to alight and walk away from the street car and the duty in regard to a car stop was the same as the defendant or any carrier in regard to a railway station or depot. *Dixon v. Great Falls & O. D. Ry. Co.*, 38 App. D. C. 591.

This refused instruction was doubly important for the court not only attempted to recapitulate the evidence (See in this regard *Sullivan v. Capital Traction Co.*, 34 App. D. C. 358, 367, *Jaquette v. Capital Traction Co.*, 34 App. D. C. 41, 44) but omitted to state the stipulation.

VI.

It was error for the Court to deny an instruction that the duty of the defendant was to provide for passengers a place to alight and walk away from the street car free from dangerous conditions.

Assignments 10 and 11 are combined (Brief 6, Appellants' App. 16).

This court said in *Washington & O. D. Ry. Co. v. Slyder*, 43 App. D. C. 95, 100 that "In such a situation the carrier's responsibility for the safety of its passenger, so far as its agencies are involved, do not end until he has been afforded an opportunity to leave its premises (citing cases)."

Pistorio v. Washington R. & E. Co., 46 App. D. C. 479, 485.

VII.

Defendant's Instruction No. 3 is incorrect in that it does not state that the defendant bears the burden of proof as to the contributory negligence of the plaintiff.

Assignment 12 is Argument VII (Brief 6, Appellants' App. ~~16, 20~~ 15, 18).

This prayer was read by counsel for defendant in his argument to the jury and by the court in his charge as defendant's requested prayer. The same proposition of law was repeated in a little different language (Appellants' App. 19, 20). This labeling of prayers surely gives the jury an incorrect impression as to the importance of that prayer and the testimony tending to prove it (end of opinion, *Washington & O. D. R. Co. v. Slyder*, see above).

The prayer states that the plaintiff bears the burden of proof as to negligence and fails to state that the defendant bears the burden of proof as to contributory negligence.

Restatement on Torts, vol. 2, sec. 477.

Jones on Evidence (4th Ed.) vol. 1, sec. 185.

Inland, etc., Co. v. Tolson, 139 U. S. 551, 35 L. Ed. 270, 11 S. Ct. 653.

Francis v. Fitzpatrick, 67 App. D. C. 69, 72, 89 F. (2d) 813.

VIII.

It was error for the Court to refuse to instruct that all the evidence must be considered as to negligence, and then to instruct that only the testimony of the plaintiff as to the charge of negligence should be considered.

Assignments 14 and 15 are combined (Brief 6, Appellants' App. ~~21, 22~~). 20, 21

Counsel for plaintiffs asked the court below in the presence of the jury, after the stated request of the judge as to any omission, that the jury be instructed to consider all of the testimony, including that of the defendant (in chief), as to the charge of negligence because she fell on the place stipulated by counsel was the car stop.

The court committed further error by instructing that only the testimony of the plaintiff (in chief) was to be considered as proof, if any, as to negligence of the defendant.

Hartman v. Ruby, 16 App. D. C. 45, 47.

Picard v. Smith, 59 App. D. C. 291, 40 F. (2d) 803.

Chesapeake & Potomac Tel. Co. v. Lewis, 69 App. D. C. 191, 99 F. (2d) 424.

Gunning v. Cooley, 281 U. S. 90, 74 L. Ed. 720, 50 S. Ct. 231.

IX.

As the Court had charged that if the evidence equally balances the jury must find for the defendant, it was error not to state that a fair example of the preponderance of the evidence was 51 per cent.

Assignment 16 is Argument IX (Brief 6, Appellants' App. ~~23~~). 21

The court charged the jury that "if the evidence fails to sustain the burden or is evenly balanced or preponderates in favor of the defendant then your verdict should be

in favor of the defendant" (Appellants' App. ¹⁸~~20~~). The court emphasizes this by the following language: " * * * as I have already said if you reach the point where the scales equally balance and you do not know which way to go then it is your duty to find for the defendant" (Appellants' App. ~~22~~). ²¹

The charge having pointed out such examples as to the failure of lack of evidence, that is, to bearing the burden of proof by proving negligence as charged by a fair preponderance of the evidence, it would be only fair to state that, if the evidence preponderates 51 per cent in favor of plaintiffs and 49 per cent in favor of the defendant, the burden of proof has been successfully carried.

Conclusion.

The judgment should be reversed and a new trial granted. The court below should be ordered to give plaintiffs' instructions, deny defendant's instruction and admit the proffered testimony.

Respectfully submitted,

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APPENDIX.

APPENDIX.**I.****PLEADINGS AND DOCKET ENTRIES DESIGNATED
BY APPELLANT.*****AMENDED DECLARATION.****Count I*

The plaintiff, Irene N. Meyers, sues the defendant, Capital Transit Company, a corporation, having
2 agents and doing business as a common carrier of passengers for hire in the District of Columbia and the State of Maryland for that heretofore, to-wit, on the 6th day of March, 1938, and for a long time prior thereto the said defendant owned and through its agents, servants and employees operated certain street cars on lines in the District of Columbia and in the State of Maryland including street cars on a line at and through Branchville, Maryland, and on said date said plaintiff was a passenger for hire on one of the said street cars on said line and said plaintiff was stepping down from said street car at the street car stop at Branchville Road & Rhode Island Avenue, Maryland, upon the place provided by the defendant as the place to alight upon and for the passage and repassage of passengers leaving said street car;

Whereupon, it became and was the duty of said defendant by its agents, servants and employees to exercise reasonable care in maintaining and operating a safe means of egress from said street car and in keeping and maintaining a place in such good condition and repair and free from all obstructions so that the same should be safe for alighting

upon and the passage and repassage of passengers, including the plaintiff;

Yet, notwithstanding said duties in the premises but in violation thereof, while said plaintiff was exercising due care and caution, the defendant, as aforesaid, carelessly, negligently, wrongfully, unlawfully and recklessly did maintain and operate an unsafe and dangerous means of egress from said street car in that the step provided for leaving said street car was a great distance from said step to the ground, to-wit, 16½ inches, and did permit and allow the said place for alighting upon and for the passage

and repassage of passengers along said street car
3 line to be and remain uneven, rough, irregular and broken and to be and remain covered with rocks, boulders and pebbles which were exposed on the ground and some of which were lying loose on the ground, and to be and remain covered with a greasy, oily substance, to-wit, axle grease, and said plaintiff while stepping down from said step to the ground was caused thereby to slip and/or slide, throwing her violently and heavily to the ground, whereby she suffered severe abrasions, bruises and contusions of the head, trunk, body, arms and legs, and her right ankle was severely and painfully wrenched, bruised, contused and otherwise injured, and she has suffered and will for a long time continue to suffer severe headaches, stomach disorders and physical and mental pain and anguish, as a result of which said plaintiff was required and will in the future be required to undergo medical treatment for a long period of time, and her nervous system was severely shocked and permanently impaired, and she has been and will be for a long time, totally and thereafter partially, incapacitated in attending to her ordinary affairs and duties, and her employment with con-

sequent pecuniary loss and damage, and she has suffered and will for a long time suffer, great physical and mental pain and anguish and as a result thereof her health and physical capacity have been and will be permanently impaired and injured, all to the damage of the plaintiff in the sum of One Thousand Dollars (\$1,000.00).

Count II

This plaintiff, Irene N. Meyers, sues the defendant, Capital Transit Company, a corporation, having agents and doing business as a common carrier of passengers for hire in the District of Columbia and the State of Maryland for that heretofore, to-wit, on the 6th day of March, 1938, and for a long time prior thereto the said defendant owned and through its agents and employees operated certain street cars on lines in the District of Columbia and in the State of Maryland including street cars on a line at and through Branchville, Maryland, and on said

4 date said plaintiff was a passenger for hire on one of the said street cars on said line and said plaintiff was leaving said street car at the street car stop at Branchville, and was walking upon the place provided by the defendant as the place to walk upon and for the passage and repassage of passengers leaving said street car;

Whereupon, it became and was the duty of the said defendant, by its agents, servants and employees to exercise reasonable care in maintaining and operating a safe means of egress from said street car and in keeping and maintaining a place in such good condition and repair and free from all obstructions so that the same should be safe for the passage and repassage of passengers, including the plaintiff;

Yet, notwithstanding said duties in the premises but in violation thereof, while said plaintiff was exercising due care and caution, the said defendant as aforesaid carelessly, negligently, wrongfully, unlawfully and recklessly did maintain and operate an unsafe and dangerous means of egress from said street car and did permit and allow the said place for walking along and for the passage and repassage of passengers along said street car line to be and remain uneven, rough, irregular and broken and to be and remain covered with rocks, boulders, and pebbles which were exposed on the ground and some of which were lying loose on the ground and to be and remain covered with a greasy, oily substance, to-wit, axle grease, and said plaintiff while walking along said place was caused thereby to slip and/or slide, throwing her violently and heavily to the ground, whereby she suffered severe abrasions, bruises and contusions of the head, trunk, body, arms and legs, and her right ankle was severely and painfully wrenched, bruised, contused and otherwise injured, and she has suffered and will for a long time continue to suffer severe headaches, stomach disorders, and physical and mental pain and anguish, as a result of which said plaintiff was required and will in the future be required to undergo medical treatment for a long period of time; and her nervous system was severely shocked and permanently impaired, and she has been and will be for a long time, totally and thereafter partially, incapacitated in attending to her ordinary affairs and duties and her employment with consequent pecuniary loss and damage, and she has suffered and will for a long time suffer, great physical and mental pain and anguish and as a result thereof her health and physical capacity have been and will be permanently impaired and injured,

all to the damage of the plaintiff in the sum of One Thousand Dollars (\$1,000.00);

Wherefore, the plaintiff brings this action and claims damages of the defendant in the sum of One Thousand Dollars (\$1,000), besides costs of this action.

ALBERT LEVIN,
ISADORE H. HALPERN,
Attorneys for Plaintiff.

* * * * *

PLEA.

Now comes the defendant, by its attorney, in the above entitled cause and for plea to the amended declaration filed therein, and to each count thereof, says:

9 1. It admits that it is a corporation and a common carrier of passengers within the District of Columbia and was operating one of its street cars at the time and place alleged. That the plaintiff had been a passenger thereon, but it denies each and every other allegation in the declaration contained. It avers that its street car was properly equipped and maintained in accordance with Public Utilities Commission order and regulation No. 683, dated September 29, 1927, passed pursuant to the authority of Section 8 of the District of Columbia Appropriation Act, approved March 4, 1913, creating the Public Utilities Commission, and giving the Commission authority to make rules and regulations for the equipment and operation of street cars, paragraphs (b) and (c) of Section 10, entitled "Equipment" of said Order No. 683 being as follows:

“(b) No car shall be ordered or purchased for service in the District of Columbia by a street rail-

way company until its plans and specifications have been approved by the commission.

(c) No material change in equipment, plan, or arrangement shall be made on any street railway car until the plans and specifications for such change or alterations are submitted to and approved by the Commission."

That said car had been inspected and approved by the Public Utilities Commission and there had been no change made in the equipment since said approval and ordered operation and that the plaintiff alighted from its said street car in a safe place and without keeping a due lookout and without paying proper attention to where she was walking permitted herself to become overbalanced or her ankle gave way and permitted herself to fall after she had alighted from the defendant's street car and had ceased to be a passenger thereon, and because thereof the injuries complained of, if any, were the result of the negligence of the plaintiff's wife.

2. For a further plea to the second count of the said declaration the defendant avers that the plaintiff alighted from its said street car in a safe place and without keeping a due lookout and without paying proper attention to where she was walking permitted herself to become overbalanced or her ankle gave way and permitted herself to fall after she had alighted from the defendant's street car and had ceased to be a passenger thereon, and because thereof the plaintiff contributed to her injuries, if any.

BOWEN AND KELLY,
By H. W. KELLY,
Attorneys for Defendant.

* * * * *

DEMURRER.

Now come the plaintiffs by their attorneys and demur
to the Pleas filed herein and for reasons therefore
12 states as follows:

1. That the Pleas are in violation of District
Court Rule 23 and Municipal Court Rule 2, Section 8.

2. That the first Plea does not deny the step of the
street car was 16½ inches from the ground.

3. The averment "safe place" is a conclusion, not
a fact.

4. The Plea does not deny the condition of the ground.

5. The Plea does not deny that a "greasy oily sub-
stance" to-wit, axle grease covered the ground.

6. The Plea does not admit nor deny that the defendant
furnished a place for the defendant to alight and to walk
and pass over.

7. The averment that the plaintiff ceased to be a pas-
senger, is a conclusion, not a fact.

ALBERT LEVIN,
ISADORE H. HALPERN,
Attorneys for Plaintiffs.

* * * * *

13 *MEMORANDA OF MINUTE ENTRIES.*

* * * * *

Nov. 16, 1938, Plaintiff's Motion for a New Trial Over-
ruled, and Judgment Entered on Finding for Defendant,
and Defendant to have Costs.

* * * * *

II.

EXCERPTS FROM BILL OF EXCEPTIONS.

Be it remembered that at the trial of these cases consolidated for trial by agreement before Judge Armond
16 W. Scott, and a jury, duly impaneled and sworn to try the issues herein, which trial began on November 1, 1938 and was continued to November 3, 1938 and was concluded on that date; the following proceedings were heard, rulings made by the court and exceptions taken and noted as follows:

After the jury had been sworn counsel for plaintiff approached the bench and advised the Court that he desired to again renew his objections to the defendant's pleas as were set forth in demurrer previously filed herein. The Court stated that he had passed upon the demurrer and his rulings on the plaintiff's motion at this stage of the case would be the same as upon the demurrer, to which counsel for plaintiff excepted.

Counsel for defendant in his opening statement to the jury referred to the space where plaintiff alighted as a
platform, to which reference counsel for plaintiff
17 objected and upon the objection being overruled, an exception was duly noted; counsel for defendant stated that he expected to prove that the step of the car was not too high and conformed to the Public Utilities Commission's regulations referred to in the Plea, to which Counsel for plaintiffs objected, which objection was overruled and exception duly noted.

Thereupon the plaintiffs, Irene N. Meyers, and Frank G. Meyers, to maintain the issues on their part joined, called as a witness Irene N. Meyers who testified as follows:

On the 6th day of March, 1938 she boarded a street car in the District of Columbia and went out for the first time

to visit her friends Mr. and Mrs. McCarthy who lived near Branchville, Maryland; she had never ridden on this line before; the sun was shining and it was dry; the street car stopped at the Branchville car stop at about 12:30 P. M.; she stepped off the car, its doors were open and its step let down and her left foot was on the step which was a great distance from the ground and her right foot upon touching the ground was caused to slip or slide by the slipperiness of the surface of the ground; that the fall rendered her semiconscious and she was picked up.

On cross examination she testified she fell and slipped while stepping off the street car and not after she had taken four or five steps from the street car; that she did not turn her head to look back to see where her husband was who was on the street car engaged in conversation with the motorman-operator, paying their fares, and the motorman-operator was making change; that her ankle did not give way and she did not have an opportunity to walk away from

the street car, as she fell upon alighting; that the
 18 step of the street car appeared high; that she did not recall the condition of the ground as the fall stunned her. She identified a pair of shoes that were worn by her at the time of the accident and which had not been worn since and were exactly as they were on the day of the accident, and the said shoes were offered in evidence. The heels on the shoes appeared to be in the neighborhood of 1½ inches high and were worn slightly on the outside, and there was not appearance of grease or any substance thereon. Photographs of the location where plaintiff fell were presented to her and she identified all of them as correctly portraying the place where the accident occurred at the time thereof.

Thereupon further to maintain the issues on their part joined the plaintiffs called as a witness the plaintiff Frank G. Meyers who testified as follows: He was on his first visit

to this place. The defendant's car stopped at the car stop at Branchville, Maryland. That it was a front entrance, one man operated street car. That most of the street car blocked Branchville Road which intersected the street car line at right angles. There was a store at least fifteen to twenty feet from the street car tracks which you faced as you stepped off the street car. His back was turned to his wife upon her leaving the street car as he was paying the fares upon completion of the ride. A fellow passenger exclaimed that a lady had fallen; the motorman-operator of the street car was making change. She was sprawled on the ground near the street car with her head away from the street car. A stranger helped him pick her up. The ground at the car stop was not any different from the surrounding terrain and dirt road, Branchville Road; that the front of the street car was directly over a car switch was heavily covered with oil and grease which appeared to be

19 axle grease and this grease extended out from its rails to the point of alighting; that the place where she alighted was rough and irregular and there was a depression at the place of alighting; that many large stones were exposed and many pebbles and stones were loose on the ground; that the ground, pebbles and stones were covered with grease; that he had removed two large stones about three inches in diameter which were laying loose on the ground about two weeks after the accident and they were similar in manner and fashion at that time as the day of the accident, which said stones were introduced into the evidence. The ties upon which the street car rails were fastened were embedded in the ground and the top of the railroad ties was even with the ground but that the rails themselves were off and above the ground. Photographs were presented to the witness who identified the same as correctly portraying the condition at the scene of the accident on the day of the accident.

Thereupon to further maintain the issues on their part joined the plaintiffs called as a witness Mrs. Jane McCarthy who testified as follows: That she lived with her husband in Greenbelt, Maryland and was very familiar with the conditions existing at the car stop at Branchville, Maryland, and had used the street car many times and the conditions of the car stop had remained and were the same over a long period of time; that loose stones and gravel and grease covered the ground at the car stop; that these conditions had existed for a long time and still existed and were the same as the surrounding ground on the Branchville Road.

* * * * *

She was thereupon asked if she had ever seen persons slipping and falling upon alighting from the street
 20 car at that stop, to which question counsel for the defendant objected, which objection the Court sustained and counsel for plaintiff duly noted his exception. Thereupon counsel approached the bench and counsel for the plaintiffs advised the Court that he desired to have the witness to testify as follows: that the conditions existing at the car stop had caused persons, and were still causing passengers, upon alighting from the street car at that car stop to slip and fall, and she had seen these accidents and they and other persons living in the community had made complaints and representations to the motormen, agents of the defendant, and to the officers of the defendant about the same, all of which was objected to by counsel for the defendant. The Court sustained the objection to introduction of such testimony and the plaintiff duly noted an exception.

* * * * *

Thereupon plaintiffs rested and the defendant proceeded with its evidence.

The defendant called as a witness Mr. Al Johnson, who testified he had run a store at that spot for many years and

the conditions at the car stop had always remained the same. He was asked to describe the conditions of the platform existing at the car stop at the time of the
 21 accident, to which question counsel for plaintiff objected to the use of the word "platform" on the ground that a platform was not pleaded and that the word "platform" was misleading in that there was no special place or wooden or concrete platform or place alleged in the pleadings, nor shown by the evidence. The objection was overruled by the Court and exception duly noted. The witness answered that the conditions existing at the car stop were, had been, and still remained the same. That there were no loose stones, no grease and no uneven places in the landing, and the place where the street car stopped to load and unload passengers was in good condition to permit passengers to board and alight therefrom. He recognized the plaintiff, Irene Meyers, and she was the woman that fell after walking eight to ten feet from the street car; that she stepped off of the street car to the ground and had walked nine or ten feet from the street car when she turned her head to look back to the street car to see where her husband was and upon looking back she fell in a heap.

* * * * *

Counsel for plaintiff objected to testimony to be given by witness, Miles, who was called by the defendant on
 22 the grounds that his testimony would be irrelevant, immaterial, improper and otherwise.

Mr. Miles testified that he was employed by the Public Utilities Commission of the District of Columbia and was an inspector of transportation equipment and had been for a number of years and was familiar with transportation equipment in use generally throughout the country and was

familiar with the transportation equipment used in the State of Maryland; that he was familiar with the type of car involved in the accident and identified the same as the Providence type from the number of the street car given to him. He stated that these cars had been purchased recently and he had examined the specifications when the same were offered for approval; that the specifications read that the step was fifteen inches from the top of the rail and the street car conformed with the specifications and the Public Utility Commission's requirements; that he examined this particular car on November 2, 1938 and that the step was fifteen inches from the top of the rail; that this was the usual height of steps of street cars throughout the country and that this height was the height of the Presi-

dent's Conference car, which was the best known type
 23 of street car construction; that if the car was stopped over a depression that the step would be further from the ground than fifteen inches; that if the car was heavily loaded the springs would give so that the step would be nearer the level surface than fifteen inches; that if the car had been used considerably and the springs weakened it would be nearer the level surface than fifteen inches. Counsel for plaintiffs renewed his previous objections.

Upon cross examination he testified that the jurisdiction of the Public Utilities Commission of the District of Columbia did not apply to the State of Maryland; that he had no authority or control to supervise the equipment used in Maryland; that he was not qualified to speak in respect to any regulation requirements of the Public Service Commission of Maryland regarding street car equipment; that he inspected equipment for use in the City of Washington with paved streets and raised platforms and otherwise.

Thereupon, further to maintain the issues on their part joined, the defendant called as a witness, Thomas P. Ward,

motorman, who testified as follows: That he had been a motorman for sixteen years; that he brought his car to the regular stop at Branchville, Maryland; that he opened the door and let down the step and the plaintiff's wife was proceeding to alight from the car; that he was facing Mrs. Meyers when she stepped off the street car and she had taken four or five steps when she looked back, turned and sat down; that there was gravel, stones and cinders on the landing of the car stop. *It was stipulated that the car was brought to a stop at the place provided by the defendant for passengers to board and alight and walk away from the street cars (italics supplied).* He further testified that the front of the street car was over the street car track switch and that the rest of the car was on Branchville road;

24 that he was making change at the time of the fall; that the photographs were shown to the witness and he identified them as photographs correctly portraying the condition existing at the Branchville car stop; that the place where the passengers alighted from the car was in good condition.

Plaintiffs' oral Instruction No. 1. Counsel for the plaintiffs' oral Instruction No. 1 was to the effect that the admission of the so-called expert testimony with reference to the height of the street car step was improper and should not have been received but in no event did it constitute the negation of negligence as was so held in the case of Capital Traction Co. v. Copland, 47 App. D. C. 152. That the Court should instruct the jury that the height of the step and the condition of the ground of the car stop and other conditions and circumstances were evidence to be considered by the jury as to the negligence of the defendant in providing for a suitable place for passengers to alight and pass over. The Court refused to grant the instruction and plaintiffs duly excepted.

Plaintiffs' oral Instruction No. 2. An instruction was asked as to the duty of the defendant to warn the passengers upon alighting of the conditions in leaving the street car, if the jury believed from the evidence that the conditions were unsafe and dangerous and were so known to the defendant. *Capital Traction Co. v. Wathen*, 35 App. D. C. 577. Exception granted upon refusal.

Plaintiff's oral Instruction No. 3. An instruction was asked in accordance with other accidents and past conduct in accordance with *Capital Traction Co. v. Copland*, *supra*. Exception granted upon refusal.

Plaintiff's oral Instruction No. 4. An instruction was requested that the car stop be likened to a railway station in accordance with *Dixon v. Great Falls and O. D. Ry. Co.*, 38 App. D. C. 591. Exception granted upon refusal.

Plaintiff's oral Instructions No. 5 and 6. Instructions in accordance with *Washington & O. D. Ry. v. Slyder*, 43 App. D. C. 95 and *Pistorio v. Washington R. & E. Co.*, 46 App. D. C. 479, as to language were refused and exceptions duly noted.

The following prayer of the defendant was granted and exception duly noted.

DEFENDANT'S INSTRUCTION NO. 3.

The jurors are instructed that before they can return a verdict in favor of the plaintiffs in this case, they must find from a preponderance of the evidence that the defendant was guilty of the negligence charged in the declaration, and even if they should find that there was such negligence on the part of the defendant, still if they further find from the evidence that there was a want of reasonable care on the part of the plaintiff, Mrs. Meyers, and that such failure to exercise due care

on the part of the plaintiff, Mrs. Meyers, directly contributed to the accident, your verdict should be for the defendant.

It was objected to on the ground that "preponderance of the evidence" did not appear in connection with the negligence of the plaintiff, Mrs. Meyers, as stated in the prayer. The prayer does not state that negligence of the defendant as shown and proven by all the evidence. This prayer was read by counsel for the defendant to the jury.

Counsel for the defendant in his argument used the word "platform" over the objection and exception of counsel for the plaintiffs.

Thereupon the Court charged the jury as follows:

We have two cases here, one of Mrs. Irene N. Meyers in which she asks to have brought in, a verdict in the
 26 sum of \$1,000 based upon the claim that upon the day mentioned in March, 1938 she was a passenger on this car and that they had gotten to Branchville, Maryland, the place where they were to get off, she and her husband, and were to continue in another vehicle to their destination. She tells us when the car stopped she got off, put one foot on the step and when she got one foot on the step and one on the landing (the platform provided by the Company at that time) she was precipitated to the ground and received the injury which she said resulted in the manner as she described.

I charge you, as I understand the law, that the Railway Company owes to this plaintiff the highest degree of care, because of defendant being a common carrier, to see that she is carried safely to her destination and that she is entitled, in getting off the car of the street railway company, to have their car and their facilities in such condition, so that she could get off that car under ordinary circumstances without being injured.

Now, they are also required under the law not only to have the platform onto which she had to alight, in such reasonably safe condition, as would not allow damage to result to the plaintiff in the ordinary exercise of care for herself in leaving the platform, or place prepared for passengers to board and alight from the street car.

You must determine from the evidence as produced on behalf of the plaintiff whether this platform was in the condition as the plaintiffs say it was.

I charge you that if you find that this loading platform was in a condition, that is if grease and loose rocks and the conditions such the the plaintiffs described, and those conditions resulted in injury to the plaintiff, then it is
 27 your duty to determine in what amount you would find for the plaintiff, Mrs. Meyers. Of course, you must find that the defendant would be liable because of any act of negligence as charged.

Her husband also testified on her behalf that he was on the car with her, and that the car stopped; that he did not see his wife get off; that he had stopped to have some conversation with the conductor; that when he saw her she was sprawled out on this landing. He very vividly described it to you, and said she was alighting. He showed us how her body was lying and that her foot, as I recall, he first said was four or five feet from the car track, and then he afterwards said about three feet. You recall that testimony.

He also said there was grease on the ground. I asked him to describe it in greater detail, and he gave us his best recollection, which you will probably remember better than I.

He further testified that at a time subsequent to that he went out there and found these two stones. As he describes them by depth, as he indicated, they were protruding above the sidewalk, that part of the stones were imbedded and

the other part was above the sidewalk; and that those stones, as he said, were in or about the spot on which his wife fell. As I recall that is about the testimony that he has introduced on behalf of the plaintiff.

* * * * *

Now, I will also advise you further about the rights of the plaintiff after I shall indicate to you the defendant's side. The defendant has asked these two prayers, which I have granted. I think they square with the law as I understand it to be.

The jurors are instructed that the mere happening of an accident is no evidence of negligence on the part of the defendant—that if something happens, somebody got killed or somebody got hurt is not evidence of negligence—and you must go beyond and find the cause of that, whether that was done by negligence, or by somebody responsible, and the burden of proof is upon the plaintiff that the defendant was guilty of negligence as charged in the declaration, and that the negligence of the said defendant was the proximate cause of the injury to the plaintiff, Mrs. Meyers, and if the evidence fails to sustain the burden or is evenly balanced or preponderates in favor of the defendant then your verdict should be in favor of the defendant.

The jurors are instructed before they can return a verdict in favor of the plaintiffs in this case, they must find from a preponderance of the evidence that the defendant was guilty of the negligence charged in the declaration. And even if you should find that there is such negligence on the part of the defendant, still if they further find from the evidence that there was a want of reasonable care on the part of the plaintiff, Mrs. Meyers, that such failure to exercise due care on the part of the plaintiff, Mrs. Meyers, was directly contributory to the accident your verdict should

be for the defendant. This simply means, gentlemen, that you are not to concede negligence, but if you find that there is negligence on the part of the defendant, as all persons are required to use a reasonable degree of care and caution

in locomotion and moving about, and if you find that
 29 the defendant was negligent and that Mrs. Meyers in going across that platform proceeded in a negligent way you must further find, if you do find, that that negligent manner in which she proceeded across contributed to this result, then of course under those conditions you would find she would be guilty of contributory negligence and she could not recover.

Mr. Johnson testified that his store was almost directly opposite the stopping place of the car, and the place where this car stopped at that time; that he happened to be looking out of the window, that he saw the lady alight from the car and walk, as he said, about eight or ten feet; he said she suddenly turned her head, and that her foot went under and she went to the ground. That is the way he described it from his viewpoint as to how this accident happened. He also told you about the condition, of the landing place. He said it was in a normal condition. And he said that he saw these gentlemen when those rocks were taken up. But he said they were not taken up from the point where this lady fell, but taken up from a point beyond that, and that he saw one of the gentlemen kicking the rocks out of the place in which they were imbedded. * * * * *

The motorman said he was operating this car. He came to a stop at the point where this lady alighted and the husband engaged him in conversation. The lady stepped off the car, and had gone eight or nine or ten feet. That she suddenly turned her head, and that when she suddenly turned her head she went down.

* * * * *

Is there anything I have omitted, if you please?

Mr. Halpern: Just this, if your Honor please;
31 Even if she walked eight or ten steps, still looked
back, and she fell because of the grease, pebbles
and stones, and falling because of her looking back still
they must find for the plaintiff.

Mr. Kelly: We object to that.

Mr. Halpern: No, but we are talking about the testimony.

The Court: No instruction can be given to the jury which is not based upon the testimony.

Mr. Halpern: We have a right to submit the testimony.

Mr. Kelly: We object.

The Court: The plaintiff did not say she slipped on any stone and fell as the result of that. But she said it happened as she stepped off the car.

Mr. Halpern: We are entitled to an instruction based upon all the evidence.

The Court: There is no evidence on the part of the defendant that there was anything in the roadway where she fell. You may have an exception.

* * * * *

The person, a plaintiff, who sets a case in motion starts out with the burden upon them to satisfy a jury
32 by a fair preponderance of the evidence. That does not mean the counting of noses. It means, however, the jury has been impressed by the evidence considering it from both sides. You must feel and find finally in your own minds that the plaintiff has produced more evidence than the defendant, it does not mean the number of witnesses, but you have been more impressed with the defendant's testimony than the plaintiff's, and if that situ-

ation arises you must of course find for the defendant, or as I have already said if you reach the point where the scales equally balance and you do not know which way to go then it is your duty to find for the defendant.

* * * * *

If you think this lady has made out a case and has satisfied you it was due to the negligence of the defendant, it is your duty to find for her and for her husband in such sums as you think just and equitable. On the other hand, if you feel they have not sustained the burden, that the plaintiffs have not made out a case such as I have indicated to you, as it must be established in order for them to recover, then under the law and the evidence as it has been brought out to you, you must find for the defendant.

Mr. Halpern: If your Honor please, would you instruct the jury further that in a charge of contributory negligence if they believe first by a fair preponderance of the evidence that the defendant was guilty of negligence and
 33 then they consider contributory negligence then the burden of contributory negligence must be borne by the defendant?

The Court: That is the law, gentlemen.

Mr. Kelly: That is correct.

Mr. Halpern: If your Honor please, may we also use the example, 51 per cent in favor of the plaintiff, and 49 per cent in favor of the defendant?

Mr. Kelly: I object to this percentage basis.

The Court: When it comes to a question of contributory negligence the burden shifts and goes back to the defendant.

Counsel for plaintiffs excepted to the Court's refusal to instruct the jury in accordance with above example.

The word "platform" was used by counsel for the defendant in his argument to the jury and was objected to,

overruled, and exception noted by counsel for the plaintiffs and was used by the Court in its charge and was objected to and an exception allowed.

And thereupon, and as all of said exceptions were duly noted and allowed as aforesaid and duly entered upon the minutes of the court; and because the matters and things hereinbefore recited are not matter of record, in order to make the same a part of the record herein, which is hereby ordered, so that the plaintiffs, by their attorney, move the court to sign and seal this, their proposed bill of exceptions, to have the same force as if each and every one of said exceptions has been separately signed and sealed, which motion the court granted; and thereupon the plaintiffs tender this, their proposed bill of exceptions, and request the court to sign and seal the same, which is accordingly done, now for then, this 1st day of April, 1941, in duplicate original; one copy to be retained by the clerk of this court and the other copy for the Court of Appeals as part of the record on appeal.

ARMOND W. SCOTT,
Judge.

3/2/41

No objection to the Court signing and sealing this Bill of Exception.

H. W. KELLY,
Atty. for Capital Transit.

ISADORE H. HALPERN,
Atty. for Plfs.

* * * * *

AMENDED ASSIGNMENTS OF ERROR.

(Brief 5, Transcript of Record 34, 35.)

BRIEF OF APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

UNITED STATES
COURT OF APPEALS FOR
DISTRICT OF COLUMBIA

No. 7880

FILED DEC 27 1941

IRENE N. MEYERS, *Appellant* *Joseph W. Blumenthal*

v.

CAPITAL TRANSIT COMPANY, a corporation, *Appellee*.

No. 8177

FRANK G. MEYERS, *Appellant*,

v.

CAPITAL TRANSIT COMPANY, a corporation, *Appellee*.

**Appeal from the Municipal Court of the District of
Columbia.**

BOWEN AND KELLY,

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Washington, D. C.

December 27, 1941.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 7,880

IRENE N. MEYERS, *Appellant*,

v.

CAPITAL TRANSIT COMPANY, a corporation, *Appellee*.

FRANK G. MEYERS, *Appellant*,

v.

CAPITAL TRANSIT COMPANY, a corporation, *Appellee*.

Appeal from the Municipal Court of the District of
Columbia.

BRIEF OF APPELLEE.

PRELIMINARY.

In this brief, for convenience, the parties to this appeal will be referred to as plaintiff and defendant.

STATEMENT OF THE CASE.

This is an appeal upon a writ of error from a judgment entered on a verdict of the jury in the Municipal Court of

the District of Columbia in favor of the defendant in an action for damages for personal injuries.

The alleged cause of action arose out of an accident which occurred on March 6, 1938 at Branchville, Md., at 12:35 p.m. The amended declaration of the plaintiff Irene N. Meyers alleged that while she was alighting from one of the defendant's cars at the street car stop at Branchville Road and Rhode Island Avenue, Maryland, upon the place provided by the defendant as the place to alight and for the passage and repassage of passengers leaving said street car, and stepping down from the step to the ground, she was caused to slip or slide, throwing her violently to the ground, thereby injuring her. The amended declaration contained two counts. The first count alleged that the fall was brought about by reason of the height of the step combined with the greasy, oily substance on, and the rough and uneven condition of, the place where she was to alight from the car. The second count alleged that the plaintiff, while walking along the place provided for passengers to walk upon alighting from the street car, fell because of the slippery and unsafe condition of the said place.

The defendant's plea set forth two defenses. The first denied all allegations of negligence against the defendant and averred facts which if proven would show that the accident was solely the result of the plaintiff's negligence, and applied to both counts of the amended declaration. The second defense averred contributory negligence on the part of the plaintiff and applied only to the second count of the amended declaration.

The action of the plaintiff Frank G. Meyers was based upon loss of services, and expenses brought about by the injury to his wife Irene N. Meyers.

The plaintiffs, to prove their cause of action, produced the plaintiff Irene N. Meyers who was the sole eye witness offered by them as to the manner in which the accident happened. Her testimony was to the effect that in the act of alighting with her left foot on the step, which was a great

distance from the ground, her right foot upon touching the ground was caused to slip or slide by the slipperiness of the surface of the ground. The defendant sought to maintain its cause upon the testimony of two eye witnesses—its operator Thomas P. Ward, and Al Johnson, a merchant who operated a store at Branchville, Md., directly opposite but a short distance from the car stop. Their testimony was to the effect that the plaintiff Irene N. Meyers had alighted from the defendant's street car and after walking eight to ten feet from the street car turned her head to look back to the street car and upon looking back fell in a heap; that there were no loose stones, no grease and no uneven places in the landing and the place where the street car stopped to load and unload passengers was in good condition to permit passengers to board and alight therefrom.

From the pleadings and the statement of the evidence the main issue in the case was whether or not the accident happened as the plaintiff Irene N. Meyers testified, or whether it happened in the way the defendant's two eye witnesses testified. This issue was properly submitted to the jury by the Trial Court and the jury promptly returned a verdict for the defendant.

SUMMARY OF ARGUMENT.

I. The issue in this case was one of fact and was determined by the jury.

II. The demurrer to the pleas was correctly overruled.

III. The inadvertent reference to the loading zone as a platform, mentioned in assignments of error 2, 4 and 13, constitutes no error and did not prejudice the plaintiffs' cases in any manner.

IV. The Trial Court's ruling on the proffered evidence as to prior accidents was correct. Assignments of error 3, 7 and 8.

V. The objection to the testimony of the witness Miles was correctly overruled by the Trial Court in view of the

issue made by the pleadings wherein the plaintiffs claim the defendant's street car step was too high, which said claim was denied by the defendant's plea. Assignments of error 5 and 6.

VI. The plaintiffs' assignments of error from 6 to 11, having to do with the refusal of the Trial Court to grant oral instructions in line with the holding of certain cases mentioned by the plaintiffs, are without merit.

VII. The Court did not instruct the jury to consider only the plaintiffs' testimony as to negligence. Assignments of error 14 and 15.

ARGUMENT.

I.

The issue in this case was one of fact and was determined by the jury.

The first count of the declaration alleged the defendant guilty of negligence because of its alleged defective equipment, namely, its car step being 16½ inches from the ground and the unsafe condition of its loading zone, in that it was rough and uneven with loose pebbles around and a greasy substance covering the same.

The second count of the declaration alleged that the defendant's loading zone was unsafe by reason of unevenness, loose stones and rough places, with a greasy substance thereon, causing the plaintiff to fall as she was walking on the said loading zone. The plea denied that the defendant's equipment was defective and it denied that its loading zone was in an unsafe condition. Mrs. Meyers to support the allegation of the declaration testified that she had her left foot on the step and her right foot upon touching the ground was caused to slip or slide by the slipperiness of the surface of the ground, causing her to fall (p. 9 of the Appendix). Neither she nor any other witness on behalf of the plaintiffs, offered any testimony as to the height of the de-

fendant's car step. Neither she nor any other witness on behalf of the plaintiffs offered any testimony whatever to support the second count, that is while walking from the car on the loading zone she slipped and fell. The plea, therefore, raised an issue as to whether or not the defendant's equipment was defective in that its car step was higher than it should have been, and whether or not its loading zone was in an unsafe condition where the plaintiff put her right foot while her left foot was on the car step. Since there was no evidence offered by the plaintiffs that Mrs. Meyers slipped while she was walking on the loading zone, away from the car, the Trial Court in all probability would have stricken the second count upon request. Certainly the condition of the loading zone, away from the car, where the plaintiff's foot did not touch according to her testimony, could not have had anything to do with the accident. It is respectfully submitted that the defendant had the right to introduce expert testimony to show that its step was not 16½ inches from the ground, that it was not too high, but, on the contrary, it was the height from the ground that was recognized by the street railway industry as being the safest known height. The defendant's testimony completely contradicted that of plaintiff Irene N. Meyers in that it was to the effect that the plaintiff had alighted safely from the car and had gone 8 or 10 feet therefrom and had turned around to look backwards to see where her husband was, who was then on the street car paying the fare to the operator thereof, when she fell. We respectfully submit, therefore, it was the jury's obligation to determine whether or not the defendant's street car step was the proper height. Also, it was for them to determine whether the plaintiff fell as she had one foot on the step and one foot on the ground, or whether she had safely alighted from the street car and had walked some distance away from the same when she fell. The jury unquestionably decided this issue under proper instructions from the Court and found a verdict for the defendant.

II.

The demurrer to the pleas was correctly overruled.

The grounds of the demurrer will be seen at page 7 of the appendix. The first objection the demurrer raised was that defendant's pleas were in violation of District Court Rule No. 23 and Municipal Court Rule 2, Section 8.

Rule No. 23 of the District Court then in force and effect was as follows:

"PLEAS

1. The plea of the general issue is abolished.
2. SHALL STATE WHAT.—Every pleading shall set forth the true facts upon which the pleader relies."

Municipal Court Rule 2, Section 8 requires pleadings in cases involving \$1,000 to comply with the Rules of the District Court. It will be seen at pages 5 and 6 of the Appendix that the plea is not one of general issue and that it sets forth the facts on which the pleader relied and therefore complied with Rule 23 of the District Court.

The second objection raised by the demurrer will be answered by a glance at the first paragraph of defendant's plea on page 5 of the Appendix. Objections 2, 3, 4, 5, 6 of the demurrer are completely answered by a glance at the defendant's plea on pages 5 and 6 of the Appendix.

The plaintiffs seeks to raise a new ground of objection to a portion of the defendant's plea in this Court, namely, "A regulation of the Public Utilities Commission of the District of Columbia is not a proper legal defense to an action arising in Maryland", shown on page 8, Point 1 of plaintiffs' brief. The plaintiffs are correct in this statement of law. Had this objection been made in the Trial Court, defendant would have withdrawn this part of its plea and would have substituted therefor the Public Service Commission of Maryland regulation in lieu thereof. In the trial of this cause counsel for the defendant for the first time realized that the wrong regulation had been pleaded

and, therefore, offered no testimony on this regulation, as pleaded, nor attempted to offer any as to what the Public Service Commission of Maryland regulation was. Counsel completely abandoned this portion of the defense and therefore whether or not this portion of defendant's plea should have been stricken on a motion to strike is immaterial, since it was not made an issue in the trial before the jury, and the plaintiff cannot be said to have been harmed thereby.

III.

The inadvertent reference to the loading zone as a platform, mentioned in assignments of error 2, 4 and 13, constitutes no error and did not prejudice the plaintiffs' cases in any manner.

Upon reference to the declaration, on page 2 of the Appendix, where the plaintiff alighted is referred to as follows: " * * * and did permit and allow the said place for alighting upon and for the passage and repassage of passengers along said street car line * * * ". To properly describe this place counsel for defendant, as well as the Court, inadvertently referred to it as a "platform" for short, also as a "loading zone". Regardless of how one would style this place, it was fully described to the jury by witnesses Irene N. Meyers, Frank G. Meyers, Jane McCarthy, Thomas P. Ward and Al Johnson. Each of these witnesses looking at photographs offered in evidence by both the plaintiff and the defendant stated that said photographs correctly portrayed the condition of this place at the time of this accident. No one could have been confused whether the term "platform" was used or the term "loading zone" was used or the term "the place where the plaintiff alighted" was used. Regardless of what term was used everyone knew that it was referring to a definite state and condition, as was shown by the photographs. We submit, therefore, that no error was committed by the ruling of the Trial Court on any of the assignments.

IV.

The Trial Court's ruling on the proffered evidence as to prior accidents was correct. Assignments of error 3, 7 and 8.

From a reference to the declaration, pages 1, 2 and 3 of Appendix, it will be seen that no allegation referred to any previous accidents brought about by negligence on behalf of the defendant by either maintaining a step that was unsafe because of its height, or a landing for passengers because of the unsafe condition thereof. The witness Mrs. Jane McCarthy and her husband had testified as to the condition of the street car landing at Branchville at the time of the accident and were shown photographs correctly portraying the then condition of the said landing. Counsel for plaintiffs then asked the question if she had ever seen persons sliding and falling upon alighting from the street car at that stop, to which question counsel for the defendant objected and the Trial Court sustained the objection. The question was objectionable for many reasons. It was leading; it brought into the case collateral issues; it did not tend to solicit an answer that would be relevant to any charge of negligence made in the declaration and would also tend to surprise the defendant. The information sought to be solicited from the witnesses was general in character and did not attempt to show that the same conditions existed at the time of the accident and at previous accidents. Whether the other persons involved in the accidents seen by them were negligent was not shown. Undoubtedly if other persons whom they had seen fall at the place where this accident happened fell by reason of their negligence it could not properly come into this case. The evidence in this case tended to show that the plaintiff Irene N. Meyers while walking in one direction turned her head around to look in the opposite direction. The jury evidently were of the opinion that she was negligent. The testimony of the expert witness Mr. Miles offered by the defendant

tended to show that the height of the car step of this car from the ground would vary in some degree, depending upon the load and the condition of its springs. The only similar condition attempted to be shown by the said testimony was that the landing was the same at the time of the accident in question as it was when prior accidents happened there.

While the general rule supported by the weight of authority is that evidence of other defects in property or other similar accidents is not admissible to show negligence in a particular case, it must be admitted that the authorities are divided on the question, and the reasons advanced for and against such admissibility in the different classes of cases are not clearly stated even by the text writers. (See note to *Alcott v. Pub. Service Corporation* (N. J.), 32 L. R. A. (N. S.) 1101.)

The proper and logical distinction, as gathered from the well considered cases, however, seems to be that where the circumstances and conditions surrounding the accidents are the same and are of a fixed character, and whether the structure in question is safe or unsafe can not be determined by inspection or common experience, but only by particular experience with it, and the causes of the various accidents do not depend upon the care of the particular persons injured, the evidence is admissible to prove a dangerous and unsafe construction or condition.

But, on the other hand, where the circumstances surrounding the accidents differ; or where the actual conditions of the structure or location can be accurately measured or proved by the testimony of witnesses; or where the accidents in question may have been the result of incapacity or negligence on the part of the person injured, the evidence is inadmissible.

If, in the latter class of cases such evidence were admitted, there would immediately arise as many collateral issues as there were accidents and the circumstances surrounding each would have to be inquired into. The Massachusetts

and Maine courts particularly have recognized this distinction. See *Collins v. Dorchester*, 6 Cush. 396; *Aldrich v. Pelham*, 1 Gray, 510; *Hinckley v. Barnstable*, 109 Mass. 126; *Menard v. Boston & M. R. Co.*, 150 Mass. 386; *Grebenstein v. Stone & W. Engineering Corp.*, 205 Mass. 431.

In the case of *Hubbard v. Androscoggin & K. R. Co.*, 39 Me. 506, 32 L. R. A. (N. S.) 1114, the Court said:

“The condition of the road, as left by the defendants, was a matter for the consideration of the jury. That condition was to be ascertained from the testimony of witnesses. If the fact that one or more persons had been upset in driving over the road in question were to be regarded as admissible in evidence, then it would be necessarily proper to receive testimony to show that the accidents which may have occurred were the results of carelessness or negligence on the part of those sustaining the injuries of which complaint is made. * * * As many distinct issues might thus be raised as there were instances of carriages passing over the road. * * * The width of the road, the smoothness of its surface, its elevations and depressions, the obstructions remaining thereon and their size and position, are all susceptible of exact admeasurement, and from these facts, as disclosed with more or less of accuracy, it will be for the jury to determine how far and to what extent the condition of the road may have been the cause of injury to the party complaining.”

In the case of *Phillips v. Willow*, 70 Wis. 6, plaintiff was injured by the overturning of the vehicle in which she was riding by striking a stone in or very near the travelled track of the highway, said to constitute a defective or dangerous obstruction. To establish these contentions other persons were allowed to testify that they had struck the same stone and nearly tipped over. In reversing this case, the Court said:

“The witnesses could describe the stone, its size and relation to the travelled track, and leave to the jury the question whether it amounted to a defect, or was of a dangerous character to travellers. This is not a case

appropriate for giving the results of experience, nor to inquire as to who have met or who have avoided accidents at the *locus in quo*."

The plaintiffs urge in the assignment of error No. 8 that some sort of instruction should have been given by the Court in conformity with the holding of the case of *Capital Traction Co. v. Copland*, 47 App. D. C. 152, without suggesting what the desired instruction should be. He then complained about the Court's failure to grant such an instruction. If the suggested instruction of counsel for the plaintiffs had to do with other accidents and past conduct, then plaintiffs had no evidence in the case to support the instruction, and his objection relates back to the Court's failure to admit the proffered testimony, as to other accidents, of the witnesses Jane McCarthy and husband. In the case of *Capital Traction Co. v. Copland*, *supra*, the facts were entirely different from those in the case at bar. In that case there was a line of poles that had been constructed too close to the rails so that when a passenger was sitting in the car with his arm protruding through the iron bars covering the windows it came in contact with these poles. The poles always remained in the same place and the type of car had been a new type known as the "Pay as you enter type" which when operated over the line constantly brought the passenger in too close proximity to the pole. This case it is believed has no application whatever to the issue raised in the case at bar and we respectfully submit that the Court was correct in its ruling on these assignments of error.

V.

The objection to the Court's ruling on the testimony of the expert witness Miles is without merit.

As has been stated the pleadings made an issue as to whether or not the defendant's transportation equipment was defective in that its step was too high. Mr. Miles was called as an expert witness. Page 12 of the Appendix shows

his qualification as follows: He was employed by the Public Utilities Commission of the District of Columbia as an inspector of transportation equipment and had been for a number of years and was familiar with transportation equipment in use generally throughout the country and was familiar with the transportation equipment used in the State of Maryland; (p. 13 of the Appendix) that he was familiar with the type of car involved in this accident; that the car had been recently purchased and he examined it when it was offered for approval; that the car conformed with the specifications and the step was fifteen inches high from the top of the rail and was the usual height of steps of street cars throughout the country and that this height was the height of the President's Conference car, which was the best known type of street car construction; that if the car was heavily loaded the springs would give so that the step would be nearer the level surface than fifteen inches; that if the car had been used considerably and the springs weakened it would be nearer the level surface than fifteen inches.

It will be seen that no attempt was made by the defendant to prove by this witness the regulation pleaded, but counsel for the plaintiffs on cross examination sought to ascertain from the witness if he was qualified to speak in respect to any regulation requirement of the Public Service Commission of Maryland in regard to street car equipment. It is respectfully submitted that since the issue as to the defendant's transportation equipment was made by the plaintiff's declaration, the defendant had a right to show by expert testimony that its equipment was the safest the industry could provide.

VI.

The plaintiffs' assignments of error from 6 to 11, having to do with the refusal of the Trial Court to grant oral instructions in line with the holding of certain cases mentioned by the plaintiffs, are without merit.

It is respectfully submitted that it is difficult to argue the plaintiffs' assignments of error in this paragraph mentioned. There was no instruction offered and it was impossible for the Court or anyone else to have in mind what sort of an instruction the plaintiffs' counsel wanted the Court to give. Counsel owes a duty to the Court to assist in correctly stating the law to a jury. The practice generally is to submit written instructions to the Court so that the Court may have an opportunity to study those instructions and determine what language to use in a charge to a jury. Counsel for plaintiffs merely orally requested the Court to charge the jury in accord with several cases which he mentioned, when the cases mentioned by him were not even brought into Court and no specific charge requested. It is respectfully submitted that from a reference to the Court's charge it will be seen that the Trial Court correctly stated the law to the jury.

VII.

The Court did not instruct the jury to consider only the plaintiffs' testimony as to negligence. Assignments of error 14 and 15.

It is respectfully submitted that the entire testimony of the defendant showed a total absence of any negligence on the part of the defendant and the sole testimony in the case that tended to show any negligence on the part of the defendant was offered by the plaintiff. The complaint made in these assignments of error as to the Court's charge will be best answered by reference to the charge found in the Appendix beginning on page 16 and ending on page 22.

CONCLUSION.

We respectfully submit that the judgment of the Trial Court should be affirmed.

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